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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1893.

STATE OF IOWA, *Complainant*,
vs.
STATE OF ILLINOIS, *Defendant*. } No. 5, Original.

BRIEF AND ARGUMENT OF THE STATE OF IOWA IN OPPOSITION TO MOTION TO SET ASIDE ORDER CONFIRMING COMMISSIONERS REPORT.

JOHN Y. STONE, Attorney General of the State of Iowa.
JOHN F. LACEY,
FELIX T. HUGHES,
JAMES C. DAVIS,
Of Counsel.

WM. REES & CO., PRINTERS, KEOKUK, IA.

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I.

STATEMENT OF FACTS.

The facts connected with this controversy are stated in the opinion heretofore rendered by this Honorable Court in this cause, and reported in the thirteen Supreme Court Reporter, page 239. The controversy arises between the State of Iowa and the State of Illinois as to the boundary line between said States where same are separated by the Mississippi river at some nine points on said river where bridges cross said river connecting the said States of Iowa and Illinois.

This Court by opinion rendered January 3d, 1893, found that the boundary line which separates said States is "The middle of the main channel of the river," and by decree duly entered, provided "That the boundary line between the State of Iowa and the State of Illinois, is the middle of the main navigable channel of the Mississippi river," and the decree further provided, "That the boundary line should be ascertained and designated by a commission consisting of three competent persons to be named by the Court, upon suggestion of counsel, and be required to make the proper examination, and to delineate by maps prepared for that purpose the true line as determined by this court."

In pursuance of the order and decree of this Court, and by agreement entered into by the respective counsel for the said States of Iowa and Illinois, a commission composed of Montgomery Meigs, John R. Carpenter and Albert Wempner was appointed by order entered on the 7th day of March, 1893. Said Commissioners duly qualified, and on the 23d day of March, 1893, completed their report in writing, so far as the boundary line at the Keokuk and Hamilton bridge was concerned, attached thereto a map designating such line, and plainly marked on the structure of the Keokuk and Hamilton bridge said boundary line, and forwarded said report to be filed with the clerk of this Court. On the 26th day of March, 1893, the Attorney General of the State of Illinois, by telegram, authorized Mr. W. I. Hayes, a member of the bar of this Court, to appear on behalf of the State of Illinois and agree that a decree might be entered confirming the report of said commissioners. The report of said commissioners was duly filed on the 30th day of March, 1893, and on the 10th day of April, 1893, this Court, by decree duly entered, confirmed and approved the report of said commissioners as to the location of the boundary line between said States at the Keokuk and Hamilton bridge.

This order having been entered on the 10th day of April, 1893, was during the existence and continuance of the October term, 1892.

The decree of this Court confirming the report of the commissioners on the date last above mentioned remained unquestioned, and no proceedings of any kind or character were instituted to change, alter or vacate same until on the 11th day of October, 1893, when the State of Illinois filed the two motions in controversy. One of said motions asked for leave to file a motion to set aside the order confirming said decree. The other motion, supported by affidavits, asked that the report of the commissioners be set aside. This latter motion is of a summary character, is supported by affidavit, and seeks to set aside a final decree of this court rendered during the October term, 1892.

The grounds upon which the State of Illinois seeks to set aside said decree are :

1st. That the State of Illinois had no notice of the action of the Court in confirming the report of the commissioners.

2d. That the commissioners either wilfully disregarded the decision and decree of this Court, or totally misunderstood same.

The State of Iowa on its part, contends :

1st. That the decree of this Court confirming the report of the commissioners, having been entered during the existence and continuance of the October term, 1892, of this Court, said decree being final, and no proceedings having been instituted to set aside, change or modify said decree during the term which same was rendered, this Court has no jurisdiction in this proceeding to grant the relief asked on behalf of the State of Illinois.

2d. The State of Iowa contends that the motion to con-

firm the report of the commissioners, and the decree of this Court entered in accordance with said motion, was upon full notice to the State of Illinois, and the order and decree of this Court confirming the report of the commissioners was made at the request of, and with the consent of, the State of Illinois, through its Attorney General.

3d. That upon the merits of the controversy it clearly appears that the commissioners followed the opinion of this Court, understood same, and located the boundary line as between said State of Iowa and said State of Illinois, in strict accordance with said opinion.

We desire to present to the Court the reasons why we believe the report of the commissioners should be sustained, and the motion of the State of Illinois should be overruled upon each of the foregoing propositions.

II.

THIS COURT HAS NO JURISDICTION IN THIS PROCEEDING TO GRANT THE RELIEF ASKED BY THE STATE OF ILLINOIS.

The proceeding instituted by the State of Illinois to set aside the decree of this court confirming the report of the commissioners, and permanently establishing the boundary line as between the State of Iowa and the State of Illinois, is not an original action instituted by filing a complaint, and based upon the ground of fraud, but is a summary motion supported by affidavits.

We contend that the decree entered in this cause confirming the report of the commissioners was in its nature a final judgment; that if it so be that said decree was final in its character, this court has no power to change, altar or modify same after the final adjournment of the court at the term at which said judgment or decree was entered.

The court will remember that in this proceeding there are nine bridges crossing the Mississippi river between

the States of Iowa and Illinois. That the original decree contemplated the establishing of a boundary line between said states at each of said bridges. That the decree of April 10th, 1893, modified the original decree to the extent that the commissioners having established the bounday line at the point of the Keokuk and Hamilton bridge said line so located, was confirmed, and the commissioners were ordered to proceed with convenient speed to measure and locate the boundary line at the other points contemplated in said proceeding.

At the date of this order the commissioners had located and marked the boundary line as between said states on the Keokuk and Hamilton bridge. So far as this particular bridge was concerned after their report was confirmed they had no further duties to perform. This report having been duly filed with the clerk was, with the consent of the interested parties, duly confirmed by judgment of this court.

We therefore submit, that so far as the controversy concerning the boundary line at the Keokuk and Hamilton bridge is concerned, it was definitely and finally determined by the report of said commissioners. There were no further proceedings to be had by this court with reference to the boundary line at this point. There was nothing further to be done by the commissioners in pursuence of the order of this court. The boundary line as indicated by them was plainly marked upon the bridge, a map indicating the boundary line accompanied the report of the commissioners, and by filing same became a part of the records of this court. There was therefore, a final, definite, and complete determination of said boundary line at the said Keokuk and Hamilton bridge.

We contend that this finding and decree was final, and of such a character that same could not be changed, modified or set aside upon motion, unless the motion was filed

or determined during the term of court at which said judgment was rendered.

This court in case of Bevy vs. Russell, 19 How. 285, in an opinion by Mr. Justice Wayne, defines e final decree as follows :

"When a decree finally decides and disposes of the whole merits of the case and reserves no further question or direction for the future judgment of the court so that it will not be necessary to bring the case again before the couat for its final decision, it is a final decree."

We submit that so far as the boundry line between the State of Iowa and the State of Illinois is concerned, the judgment confirming the finding of the commissioners finally decides and disposes of the whole merits of the case as to that particular location and that it was not necessary to bring the said cause upon this particular point, again before this court for final decision.

In the recent case of Central Trust Co. vs. Grant Locomotive Works, 10 Sup. Ct. Rep. 741, 135 U. S. 207, this court, in an opinion delivered by Chief Justice Fuller, collated a number of authorities in determining what were final judgments and decrees. In this particular case in a foreclosure proceeding, the ownership and value of certain locomotives, was determined upon a petition of intervention. This court held such determination to be a final decree and in the course of the opinion it was said :

"If these orders were final decrees, the court could not vacate them of its own motion after the close of the October term, 1883. McMicken vs. Perin, 18 How. 507-511. We think they were final. They determined the ownership of the locomotives, and the right to their possession; that they were essential to the operation of the roads by the receiver, and should be purchased by him; that certain designated amounts should be paid for the rentals and the

purchase price, which amounts were made a charge upon the earnings, income and property of the T. C. & St. L. R R. Co. * * * They were therefore final in their nature, and made upon matters distinct from the general subject of litigation—the foreclosure of the mortgages. In Trustees vs. Greenough, 105 U. S. 527, an appeal from an order for the allowance of costs and expenses to a complainant, suing on behalf of a trust fund, was sustained. In Hinckley vs. Railroad Co., 94 U. S., 467, a receiver was allowed to appeal from a decree against him to pay a sum of money in the cause in which he was appointed. In Williams vs. Morgan, 111 U. S., 684, a decree in a foreclosure suit, fixing the compensation to be paid to the trustees under a mortgage from the fund realized from the sale, was held to be a final decree as to that matter. And in Fosdick vs. Schall, 99 U. S., 235, a decree upon an intervening petition in respect to certain cars used by a railroad company under a contract with the manufacturer was so treated. There was a fund in court in that case, but in principle the orders here are the same. And see In re Farmers' Loan & Trust Co., 129 U. S., 206-13."

It will be seen that in the above entitled cause certain *orders* made in connection with the ownership of some locomotives were held to be final decrees, and the reason of the opinion seems to be that said orders, so far as said locomotives were concerned, were final, and the court by said orders disposed of the particular property in that controvery.

So we say in the case at bar, that the order of this court confirming the report of the commissioners as to the location of the boundary line between Keokuk, Iowa, and Hamilton, Illinois, was finally disposed of and no other proceedings on the part of the court, or of the commissioners, was necessary to fully and completely determine said boundary line at said point.

It seems to be well established, not only by the decisions of this court, but as a general proposition, that after the final adjournment of a court at the close of any specific term the jurisdiction of the court over controversies that have been finally disposed of by final judgment or decree duly entered, ceases and determines, and there is no authority vested in the courts to change, alter or modify their judgments or decrees except upon bill in equity stating sufficient cause to grant relief upon the ground of fraud.

In case of Bronson vs. Schulten, 104 U. S., 411, Mr. Justice Miller, in delivering the opinion of the court, announces the following proposition:

"Does the power of the court over its own judgment, exercised in a summary manner on motion, after the term at which it was rendered, extend beyond this?

In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the state courts, they are unimportant. It is a general rule of the law that all judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court.

But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its coutrol, unless stephs be taken during that term, by motion or otherwise, to set aside, modify or correct them, and if errors exist, they can only be corrected by such proceeding by a writ of er-

ror or appeal as may be allowed in a court, which, by law, can review the decision. *So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decision. it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court.*"

In support of the foregoing the following authorities are cited:

Brooks vs. R. R. Co., 102 U. S , 107.
Public Schools vs. Walker, 9 Wall , 603.
Brown vs. Aspden, 14 How., 25.
Cameron vs, McRoberts, 3 Wheat, 591.
Sibbald vs. U. S,, 12 Pet., 488.
U. S. vs. The Big Glamorgan, 2 Curt., C. C , 236.
Bradford vs. Patterson, 1 A. K., Marsh, (Ky.,) 464.
Ballard vs. Davis, 3 J. J., Marsh. (Ky.,) 656.

In case of Tyler vs. Magwire, 17 Wall., 283, this court in an opinion by Mr. Justice Clifford, said:

"Rehearings are never granted where a final decree has been entered and the mandate sent down, unless the application is made at the same term, except in cases of fraud. Appellate power is exercised over the proceedings of subordinate courts, and not over the judgments or decrees of the appellate court, and the express decision of this court in several cases is that 'The court has no power to review its decisions, whether in a case at law or in equity, and that a final decree in equity is as conclusive as a judgment at law,' which is all that need be said upon the subject."

We therefore respectfully submit that the order and decree confirming the report of the commissioners was final in its character; that no proceedings were instituted during the term in which said order was made, and that

at this time in this proceeding, this court has no jurisdiction to grant the relief asked by the state of Illinois.

III.

THE ORDER COMPLAINED OF WAS ENTERED UPON NOTICE AND BY AGREEMENT ON THE PART OF THE STATE OF ILLINOIS.

It appears from the affidavit of Mr. Walter I. Hayes, a member of the bar of this court, that in asking for the confirmation of the report of the commissioners, he did so at the joint request of the state of Iowa and the state of Illinois. At the time the motion asking for a confirmation of the report of the commissioners was filed—the record of this court, as made in the order granting permission to file said motion under date March 30, 1893, recites that Mr. Walter I. Hayes appeared in "behalf of counsel," clearly indicating that his appearance was in behalf of counsel for both parties.

It is significant that counsel on behalf of the state of Illinois have filed no paper which indicates that the confirmation was made without notice to them. The Honorable Attorney General of the state of Illinois does not file an affidavit in which he undertakes to say that he had no notice or knowledge of the filing of the report, or that a motion to confirm said report would be presented to this court.

On the contrary it expressly appears that a telegram bearing the signature of M. T. Malony, Attorney General for the state of Illinois, was directed to, and received by, Mr, Hayes, which telegram, in express and concise terms, authorizes and directs Mr, Hayes to appear in behalf of the state of Illinois and consent to a confirmation of the report of the commissioners. The language of the telegram is not ambiguous and is subject to but one construction, and is as follows :

"You are authorized to appear in Supreme Court of United States in case of Iowa vs. Illinois, and consent to the confirmation of the report of the commissioners as to line at Keokuk and Hamilton bridge."

The report bears date March 23rd, 1893. At that date there had been plainly marked upon the Keokuk and Hamilton bridge the boundary line. Subsequent to the sending of this telegram, the report was filed. In pursuance of the telegram and the authority therein contained, Mr. Hayes on behalf of the state of Iowa moved for a confirmation of the report, and under the authority of the above telegram consented for the state of Illinois to the confirmation of same, and on the 10th day of April, 1893, an order and decree of this court was made confirming the report of said commissioners.

It appears by the affidavit of Mr. George Edmunds, on behalf of the state of Iowa, that he was in the city of Springfield, Illinois, on the first or third day of April, 1893, eight days prior to the order confirming said report; that at said time and place the fact that the report had been filed was indicated by Mr. Edmunds to the Attorney General of the state of Illinois.

We can conceive of no legal or equitable principle which would relieve the state of Illinois from the action of its accredited agent.

The decrees and judgments of courts cannot be set aside for mere acts of negligence or oversight on the part of the parties to a controversy, and we believe, that as the merits of this controversy will show, the Attorney General of the state of Illinois was fully justified in agreeing to a confirmation of said report, and had it not been for mere local feeling which has become unduly excited over the amount of property to be taxed by the respective municipalities in Iowa and Illinois, the action of the Attorney General of Illinois in consenting to the confirmation of said report would have remained unquestioned.

In any event counsel having consented to the order of confirmation, the decree of this court having been entered in pursuance of said consent, we submit that the state of Illlnois is without redress upon this proposition.

IV.

MERITS OF THE COVTROVERSY.

We desire to submit to the court a few suggestions as to the merits of this controversy.

The opinion heretofore rendered by this court in this cause in clear, concise and unambiguous language defines the boundary line as between the state of Iowa and state of Illinois. After an examination of the leading authorities upon international law, this court says:

"The true line in navigable rivers between the states of the Union which separates the jurisdiction of one from the other, is the middle of the main channel of the river. Thus the jurisdiction of each state extends to the thread of the stream. that is, to the mid-channel, and if there be several channels, to the middle of the principle one, or rather the one usually followed."

And in the course of the decree it was ordered: "That the boundary line between the state of Iowa and state of Illinois is the middle of the main navigable channel of the Mississippi river."

In is a furthər part of the opinion it was determined: "That the line between the territory now comprising the state of Iowa and the state of Illinois was defined in the treaty between England, France and Spain in 1763 as the middle oftne "River Mississippi." That by treaty of Paris between Great Britian and the United States of date 1783, the boundary line remained the same as was flxed by the treaty of 1763, to-wit: The middle of the "River Mississippi." That by act of congress of date April 18, 1818, known as the "Act Enabling the People of Illinois to

Form a State Constitution," the boundary line was described as the middle of the Mississippi river"

We therefore contend that the boundary line as between the state of Illinois and the state of Iowa is not to be determined by the condition of the bed of the Mississippi river at the present time, especially, as within the memory of many living witnesses, substantial changes have been made in the bed of said river by artifical means as the result of the construction of the Des Moines Rapids canal, the Keokuk and Hamilton bridge and extended approaches to said bridge built from the original Iowa shore and Illinois shore, but that said boundry line remains as same was fixed either in the treaty of 1763, 1783 or by act of congress of date 1818. We do not understand that the court has laid down any new principles in this case, or reversed its former opinions, as, when a boundary line of this character is fixed.

In the case of Missouri vs. Kentucky, 11 Wall. 401, this court through Mr. Justice Davis, had occasion to determine when the boundary line of a state was fixed, and in the course of that opinion says :

"It is unnecessary, for the purpose of this suit, to consider whether, on general principles, the middle of the channel of the navigable river which divides co-terminous states, is not the true boundary between them, in the absence of express agreement to the contrary, because the treaty between France, Spain, and England, in February, 1763, stipulated that the middle of the river Mississippi should be the boundary between the British and French territories on the continent of North America. *And this line, established by the only sovereign powers at the time interted in the subject, has remained ever since as they settled it.* It was recognized by the treaty of peace with Great Britain of 1783, and by different treaties since then, the last of

which resulted in the acquisition of the Territory of Louisiana (embracing the country west of the Mississippi) by the United States in 1803. The boundaries of Missouri, when she was admitted into the Union as a state in 1820, were fixed on this basis, as were those of Arkansas in 1836. And Kentucky succeeded, in 1792, to the ancient right and possession of Virginia, which extended, by virtue of of these treaties, to the middle of the bed of the Mississippi river. It follows, therefore, that if Wolf Islaud, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. *If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it*, for the channel which the river abandoned remains, as before, the boundary between the states, and the island does not, in consequence of this action of the water, change its owner."

In the recent case of State of Nebraska vs. State of Iowa, reported in 145 U. S. 519, 12 S. C. R. 396, this court had occasion to announce certain rules concerning the boundary line as between states when same is marked by a navigable river, and while the contention in that case was as to the effect of a gradual accretion or degradation of the banks of the river, yet the court announced certain rules that are applicable to the case at bar. It was said by this court through Mr. Justice Brewer :

"It is equally well settled that where a stream, which is a boundary, *from any cause* suddenly abandons its old and seeks a new bed, *such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein.*" This sudden and rapid change of channel is termed in the law, "avulsion." In Gould, Waters, Sec. 159, it is said : "But if the change is violent and visible, *and arises*

from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two states." See cases cited.

In the case at bar the change in the bed and channel of the Mississippi river has been from purely artificial causes. The changes made in the banks of the river are clearly indicated by the dykes and fills constructed in the various bridge and canal improvements made in the vicinity of the line in controversy.

The condition of the bed of the Mississippi river at the point crossed by the Keokuk and Hamilton bridge seems to be of a permanent and unchanged character. The affidavit and report of the government engineers, Meigs and Carpenter, (Complainant's record P 11) a copy of which was furnished by said commissioners to the clerk of this court and the Attorney Generals of the states of Iowa and Illinois, describes the bed of the Mississippi river as of solid rock; that the current coming from the Rapids is of such a character as to keep said bed free and clear from accumulations, and with the exception that there may be occasionally soft places in the rock in which there have been worn depressions by the action of the water and the ice, the bed of the Mississippi river at this point has undoubtedly remained in substantially the condition that it now is for time immemorial.

It appears that before the construction of the Keokuk and Hamilton bridge the Illinois shore was 700 feet east of the present easterly abutment of the bridge; that there was located upon said shore railroad depots and steamboat landings; that large ferry boats and other boats engaged in the ordinary commerce of said river landed at said Illinois landing, receiving and discharging freight, and that the river between the shore at Keokuk, Iowa, and Hamilton, Illinois, was navigable at all seasons of navigation.

The test of the boundary line as indicated by this court seems to be navigability, and this main arm of the Mississippi river west of the shore of island No. 4, was, prior to the artificial obstructions placed in same, navigable, and navigated, from shore to shore.

The plat presented by the state of Illinois, as prepared by Engineer McMath, can aid but little in this controversy. It appears from the statement of the commissioners, (complainant's record, p. 13,) and other despositions, that the deep water indicated on said map at station 1650 is a pocket in the bed of the river which fades into shallows north and south of said depression. That the shallow water at station 1400 is occasioned by the soundings having been taken upon an old crib left in the river, and the shallow water at station 950 is occasioned by soundings having been taken upon rock thrown in the river to support a pier of the bridge, while the soundings taken at stations 2050, 2100, 2150, (west end,) went to the bottom of the channel, excavated by the United States since the bridge was built. With these exceptions there would seem to be a depth in the bed of the river along the entire distance between the east and west abutment of said bridge of considerably over three feet, and when it is borne in mind that these soundings were made at a time the river was exceptionally low and was only four-tenths of a foot above low water mark; when it is further considered that boats which navigate the Mississippi river in a low stage of water can run over thirty inches, and most, if not all of them, can run in three feet of water, it will be seen that the plat of Engineer McMath, with the exception of the artificial obstructions above indicated, discloses that the said river is navigable from abutment to abutment.

If the court on the other hand will examine the plat attached to the affidavit of O. S. Willey, who is now in

A writ of error was thereupon sued out, and the judgment for the additional punishment was reversed.

In *Ex parte* Lees, El., B, and E, 828 (1858), Lees had been indicted on four counts and tried before the criminal sessions of the supreme court of the Island of St. Helena, and convicted on one count of assaulting one Burch, with intent to do grievous bodily harm. Lees made application for a writ of error, or for certiorari, or for a writ of habeas corpus, for the purpose of quashing the conviction.

The opinion of Lord Campbell states: "It is alleged on the part of the prisoner that the proceedings were upon a repealed statute, and that there were errors in the judgment and hardships and irregularities in the proceedings." The report does not show specifically the character of the alleged errors, except a reference to the claim that the indictment was bad. On the question of allowing a writ of habeas corpus, the Chief Justice said:

> A writ of habeas corpus, to the expediency of granting which we have also directed our attention, is not grantable in general where the party is in execution on a criminal charge, after judgment, on an indictment according to the course of the common law. And, even supposing it could run to St. Helena, it could only be useful as auxiliary to or accompanying a writ of error, as it is only by writ of error that such judgment, according to the course of the common law, can properly be reversed; until the judgment be reversed the prisoner ought not to be discharged. For these reasons we think that we ought not to interfere.

A rule was refused.

These cases seem but to state the rules of law which were announced in the cases of habeas corpus that came before this court early in the century (*Ex parte Kearney*, 7 Wheat., 38 (1822), opinion by Mr. Justice Story, and *Ex parte* Watkins, 3 Pet., 193 (1830), opinion by Chief Justice Marshall; and since they declare the rule of the common law, they should govern the practice of this court in applications such as we have at bar. In *Ex parte Parks* (93 U. S., 18, 21), Mr. Justice Bradley said:

> The general principles upon which the writ of habeas corpus is issued in England were well settled by usage and statutes long before the period of our national independence, and must have been in the mind of Congress when the power to issue the writ was given to the courts and judges of the United States. These principles, subject to the limitations imposed by the Federal Constitution and laws, are to be referred to for our guidance on the subject.

In *In re Coy.* (127 U. S.) Mr. Justice Miller said (p. 757):

> But with what propriety can this court look into the indictment? We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control. An imprisonment under a judgment can not be unlawful, unless that judgment is an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.

What punishment is permissible often presents a question of law for the determination of the trial court, as much so as any question arising upon the sufficiency of the indictment, or in the course of the trial. (For example, *State* vs. *Shaw*, 23 Iowa, 316, and *Ex parte Van Hagan*, 25 Ohio St., 426.) If the court errs in holding the indictment sufficient, the prisoner has no relief by habeas corpus, although he may be innocent of crime, but if he is found guilty by the verdict of a jury, or even by his own confession, the slightest mistake of the judge in awarding sentence operates as an acquittal, according to the doctrine of opposite counsel.

The only case I have found, aside from the case of Mills, in which discharge by habeas corpus was allowed for an excessive sentence upon a valid conviction, is *State* vs. *Gray* (37 N. J. L., 368; 1837), where, it is to be borne in mind, the court had also appellate jurisdiction over the offense and on error could have reversed the judgment, in which event, being without power (in its opinion) to render a proper sentence or to remand to the lower court for that purpose, it would have been compelled to discharge the prisoner. It therefore discharged him at once upon a writ of habeas corpus, without putting him to his writ of error. But this is contrary to the rule of the common law, under which the courts, although denying to themselves the power to modify judgments, nevertheless refused to discharge by habeas corpus from imprisonment under erroneous judgments, recognizing the imprisonment as lawful until judgment reversed.

I do not overlook *Ex parte* Page (49 Mo., 291), (1872). But in that case reliance was placed on certain provisions

of the statutes of Missouri, which the court cites, providing that where the jurisdiction of a court has been exceeded, either as to time, place, sum, or person; or where process is not authorized by any judgment, order, or decree, or by any provision of law, relief may be given by a writ of habeas corpus. After citing the sections referred to, the court said, p. 292:

> It seems to me that the court in passing the sentence exceeded its jurisdiction in the matter, and that it did not act by authority of any provision of law. This application, therefore, I think, comes within the meaning of the statute.

III.

THE ERRONEOUS SENTENCE CAN BE CORRECTED IN THE CIRCUIT COURT OF APPEALS THE CONVICTION BEING VALID, AND THE PETITIONER SHOULD NOT THEREFORE BE DISCHARGED ABSOLUTELY.

If the petitioner were to seek relief by a writ of error in the circuit court of appeals, it would be competent for that court, under the present statutes regulating writs of error, to reverse the judgment for error in directing the incarceration to be made in the penitentiary, and to remand the case for proper sentence to a jail. The prisoner should therefore be remitted to that remedy, instead of being discharged absolutely on habeas corpus, or if discharged from the penitentiary on habeas corpus, he should be disposed of "as law and justice require" (Rev. Stat., Sec. 761), and be turned over to the marshal of the Indian territory in accordance with the practice adopted in *Medley petitioner* (134 U. S., 160, 173).

It may be true, as observed by Mr. Justice Jackson in the case of *Frederich* (149 U. S., 70, 74), that, at common law, the courts generally denied to themselves the power upon a writ of error in a criminal case, where there was an erroneous judgment upon a valid conviction, to enter a proper judgment or to remand the case for that purpose, and felt themselves bound in such a case to discharge the prisoner absolutely. But there are many cases which deny that such was the rule of the common law. For instance in *Beale* vs. *The Commonwealth* (25 Pa. St., 11), on p. 22, the court said :

> The doubts which formerly existed respecting the power of the Supreme Court, upon reversing a judgment in a criminal case, are entirely dissipated. We have authorities to show that the Supreme Court, on reversal of a judgment in a criminal case for error in the sentence, has power to pass such sentence as the court below ought to have passed. (*Drew* vs. *The Commonwealth*, 1 Wharton, 281 ; *Daniels* vs. *The Commonwealth*, 7 Barr, 375 ; *Commonwealth* vs. *Ellis*, 11 Mass., 465 ; *Kane* vs. *The People*, 8 Wend., 211.) It also has the power to award a procedendo in a criminal case (*Rex* v. *Kenworthy*, 1 B & C., 711) ; and it may in its discretion remit the record with orders to proceed on the indictment after the reversal of an erroneous judgment. (*Commonwealth* v. *McKisson*, 8 Ser. & R., 422 ; *Commonwealth* vs. *Church*, 1 Barr, 110.) The act of June 16, 1836, conferred no new powers in this respect. It was designed to remove doubts which had arisen in consequence of conflicting decisions. The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine, that a prisoner whose guilt is established by a regular verdict is to escape

> punishment altogether because the court committed an error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established. Our duty is to correct errors and to "minister justice." But such a course would perpetuate error, and produce the most intolerable injustice.

And in *Kelly* vs. *State* (3 Sm. & M., 518), 1844, the sentence of the court omitted to fix the date from which the commencement of punishment should date. The reviewing court held the judgment erroneous; but, further, held that—

> Where there is no objection to the verdict of the jury finding the prisoner guilty of manslaughter, but the sentence of the court is defective, the judgment will be reversed without disturbing the verdict, and the cause remanded with direction to pronounce correct judgment.

In *Oliver* vs. *State* (5 How., Miss., 14), 1840, the defendant was sentenced on a conviction for larceny to be whipped and confined in the pillory, etc., when imprisonment only was authorized. The reviewing court held this *error*, and said:

> The judgment of the court below must therefore be reversed and rendered here in pursuance of this opinion, that the prisoner be confined in the penitentiary of this State for the term of one year, as the law directs.

But without discussing the true rule of the common law, I submit that, under the statutes now in force, this court and the circuit courts of appeal have the authority, which

has existed in England by statute since 1848, and which is conferred quite generally on the State courts, to correct erroneous sentences on valid convictions, and that they are not obliged in such cases to discharge the prisoner absolutely.

Section 2 of the judiciary act of June 1, 1872 (c. 255, 17 Stat., 196), provided that—

> * * * The appellate court [referring to Supreme Court and circuit courts] may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require.

The subject was covered in the revised statutes by the following provisions:

> SEC. 701. The Supreme Court may affirm, *modify*, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, *or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require.* The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon.
>
> SEC. 636. A circuit court may affirm, modify, or reverse any judgment, decree, or order of a district court brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the district court, as the justice of the case may require.

By the act of March 3, 1891 (c., 517 ; 26 Stat., 826), jurisdiction is conferred by section 6 on the circuit courts of appeals in all criminal cases, except in the case of conviction of a capital or otherwise infamous crime. And by section 11 it is provided:

> And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error.

Referring to the statute of Massachusetts (St. 1851, c. 87), which empowered the supreme judicial court, upon a writ of error, on account of error in the sentence, to render such judgment thereon as should have been rendered, or to remand the cause for that purpose to the court before whom the conviction was had, Chief Justice Shaw, in *Jacquins* vs. *Commonwealth* (9 Cush., 279, 282), said:

> Such a statute has long been demanded to prevent a palpable failure of justice. Judgments in criminal cases are often passed under a pressure of business, and when there is little time for deliberation and it would tend to bring the law into disrepute and impair its efficacy if criminals, acknowledged to be rightly convicted, could escape punishment altogether by taking advantage of a mere mistake in the sentence.
>
> It is argued that this statute disturbs the symmetry of the common law. That is nothing more than a figurative expression, if it means that it does more than every other statute does. All statutes are

intended to modify the common law, to affect remedies and future proceedings of various sorts. The question is, simply, whether it disturbs the fundamental principles of right, and we think it does not.

IV.

THE PETITIONER SHOULD BE REMITTED TO THE CIRCUIT COURT FOR RELIEF.

On July 8, 1893, the petitioner made an application for a writ of habeas corpus on the same ground to Oliver P. Shiras, district judge of the United States for the northern district of Iowa, and, on August 15, 1893, his petition was refused and the writ denied.

I submit whether, if the petitioner is entitled to a writ of habeas corpus, he should not be remitted to an appeal to the circuit court from the order of Judge Shiras, under Revised Statutes, section 763, which provides that "From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard: (1) In the case of any person alleged to be restrained of his liberty in violation of the Constitution or any law or treaty of the United States;" or to an application to the circuit court direct.

The act of March 3, 1891, establishing the circuit court of appeals, by its fourth section, expressly takes away all right of appeal from the district courts to the circuit courts, but it has not yet been decided in this court that the general language of the section repeals the provision